

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-2150

UNITED STATES ex rel. LARRY C. MOSLEY,

Petitioner-Appellant,

vs

Docket No. 77-2150

HAROLD J. SMITH, Supt.,
Attica Correctional Facility,

Respondent-Appellee.

UNITED STATES ex rel. DORIS McNAIR,

Petitioner-Appellant,

vs

Docket No. 77-2151

FRANCES CLEMENT, Acting Supt.,
Bedford Hills Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of New York

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APPELLANTS' PETITION FOR REHEARING
&
SUGGESTION FOR REHEARING EN BANC

=====

Dated: June 1, 1978.

Respectfully submitted,

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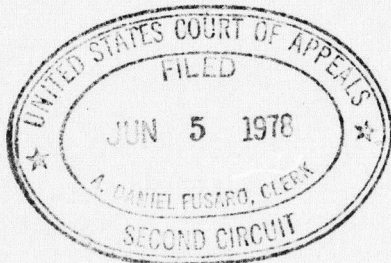


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A. ISSUE & SUMMARY.

The sole issue in this appeal is whether New York's mandatory life penalty and accessory provisions for possession and sale of heroin are cruel and unusual punishment or a denial of equal protection.

A panel of this court affirmed a district court determination that the classification and sentencing laws were not unconstitutional on the basis of another panel's decision, with Judge Oakes dissenting, in United States ex rel. Carmona v Ward, slip op. 2647 (Docket No. 77-2110)(CA2, 4-21-78).

The petitioners-appellants petition this court for a rehearing, and respectfully suggest that the case be reheard en banc. We further suggest that this appeal be reheard jointly with any rehearing granted in the Carmona case, supra, for which a petition for rehearing en banc, dated May 5, 1978, is pending.

This petition is necessary directed to reasoning in the Carmona opinion.

The Carmona panel recognized settled standards for 8th Amendment adjudication, but refused to apply some standards and erroneously applied others in reliance on misinterpreted statistical data in secondary sources and on misapprehended legal theories, and by overlooking other established facts.

The panel's decision involves the constitutionality of a major state statute of exceptional importance both to the general public and to the thousands of persons prosecuted and sentenced under it. The decision will also have a major impact on the application of the 8th Amendment to non-capital cases. We therefore respectfully suggest that the case be reheard en banc.

B. STATEMENT OF THE CASE.

In July 1974, the petitioner Mosley pleaded guilty to the class A-III felony of criminal sale of a controlled substance (heroin) in the 3d degree, and brought an immediate challenge to the 1973 New York drug law. Monroe County Court Judge Celli issued a decision declaring the drug law unconstitutional under the 8th Amendment, People v Mosley, 78 M2d 736, 358 NYS2d 1004, after which, in September 1974, he imposed a sentence of 3 to 6 years. In September 1975, on remand from the Court of Appeals, Judge Celli re-sentenced Mr. Mosley to a mandatory 1-year-to-life term.

In April 1974, the petitioner Doris McNair was convicted of the class A-II felony of criminal possession of a controlled substance (heroin) in the 2d degree and two misdemeanors, and was sentenced by Monroe County Court Judge Bergin to a term of 6-years-to-life.

In a consolidated appeal, the N.Y. Appellate Division, 4th Dept., upheld the constitutionality of the drug law, sub nom., People v McNair, 46 AD2d 476, 363 NYS2d 151. The N.Y. Court of Appeals, consolidating several cases, affirmed the Appellate Division, sub nom., People v Broadie, 37 NY2d 100, 371 NYS2d 471 (1975), while acknowledging that neither Mosley nor McNair was a hardened criminal.

In July 1975, both petitioners filed writs of habeas corpus, challenging the constitutionality of the drug law. In June 1977, District Judge Burke issued an order denying the petitions on the basis of the Broadie case. A panel of this court affirmed on the basis of the Carmona decision, by an order dated May 19, 1978.

Both petitioners are presently on parole.

The question whether the petitioners' failure to appeal their state conviction to the U.S. Supreme Court is a bar to federal habeas corpus was briefed, as required by the certificate of probable cause, but not specifically ruled on. A motion to dismiss for mootness was also not specifically ruled on.

C. CARMONA OPINION, GENERALLY.

The majority opinion acknowledged the general proposition that a punishment which is disproportionate to the gravity of the crime, even if solely because of its length, is cruel and unusual punishment (slip op., 2653, 2655), and acknowledged the tripartite test for disproportionality as judging the seriousness of the offense, and comparing the penalty with that fixed for other crimes in the same jurisdiction and for the same crime in other jurisdictions. (slip op. 2655-56).

However, as dissenting Judge Oakes observed:

"Though the majority purports to apply this rubric, in reality it glosses over the three basic elements. It fails first to focus on the actual crimes...emphasizing instead the general evils of drugs and drug trafficking. Second, in comparing the sentences...with other New York crimes, the majority does not mention more serious crimes which carry lesser sentences....Finally, the majority makes no real comparison with the sentences imposed by other states for drug crimes, conclusorily stating instead that the problems created by drugs are greater in the state of New York than in other states, a matter of which the majority takes judicial notice." (slip op. 2682-83)

The majority failed even to acknowledge the U.S. Supreme Court's alternative test under which a penalty which is not disproportionate is nevertheless cruel and unusual if it makes not measurable contribution to acceptable goals of punishment.

Although dissenting Judge Oakes would review the validity of the maximum life sentence actually imposed (slip op. 2673-74), the majority declined to review that sentence, choosing instead to review the sentence as discounted by the possibilities of parole and discharge. (slip op. 2665-66)

Misinterpreted and erroneous factual data formed the basis of some of the majority's major conclusions.

D. MANDATORY LIFE SENTENCE LEFT UNREVIEWED.

Although the majority initially posed the "major question on appeal" as being whether the mandatory life sentence is unconstitutional (slip op. 2653), it subsequently refused to answer that question. The majority specifically rejected the conclusions of other courts that the sentences must be judged by their maximum and, without citation to any authority, ruled that the life sentences would be judged as discounted by the probability of parole **after service of** the mandatory minimum and by the probability of discharge from parole. (slip op. 2665-66).

The majority's ruling on this question runs counter to all known case law, including that of New York's highest court in this very case, which holds that the possibility of parole or other discretionary release may not be considered in determining the constitutionality of a maximum sentence. See People v Broadie, 37 NY2d 100,¹¹¹ 371 NYS2d 471, 475 (1975), cert. den., 423 US 950 (1975); Rummel v Estelle, slip op. 2580, 2583 (Docket No. 76-2946)(CA5, 3-6-78); Hart v Coiner, 483 F2d 136 (CA4, 1973), cert. den., 415 US 938 (1974); In re Lynch, 8 Cal 3d 410, 105 Cal Rptr 217, 503 P2d 921, 924-26 (Calif. Sup. Ct., 1972)(in bank); State v Kimbrough, 212 SC 348, 46 SE2d 273, 277 (1948); State v Evans, 73 Idaho 50, 245 P2d 788, 794 (1952). The U.S. Supreme Court, in determining whether denationalization was cruel and unusual, ruled that it was no answer to suggest that the disastrous consequences of that penalty might never occur, saying that: "the threat makes the punishment obnoxious." Trop v Dulles, 356 US 86, 101-02, 2 LEd2d 630, 643, 78 Sct 590 (1958).

These cases pointed out that parole, pardon, and commutations are acts of grace and matters of discretion which may be refused and without review absent unusual circumstances; that the parole board is not a judicial tribunal empowered to impose sentence or competent to determine constitutional questions, and cannot be counted upon to release a defendant whenever further incarceration would be cruel and unusual; and that the constitutionality of the sentence must therefore be determined not by what clemency might be exercised by the parole board for good behavior or other reasons, but by what might be done with its fullest authority to keep the defendant in prison for life; the greater punishment must itself be one which it is within the power of the legislature to decree.

The Second Circuit has itself characterized New York's parole release standard as "extremely vague" and as vesting the board, whose competence to make such predictions has been "questioned", with "apparently unfettered discretion". U.S. ex rel. Johnson v Chairman, N.Y. State Board of Parole, 500 F2d 925, 929 (CA2, 1974). The parole discharge standard of "the interests of society" is even more vague and practically immune to challenge. Yet, as noted in the Carmona dissent (slip op. at 2677) and in Rummel (CA5)(slip op. at 2583), the majority's view will inevitably enmesh federal courts in state parole release and discharge decisions to determine when each sentence becomes cruel and unusual.

Another important consideration apparently overlooked by the Carmona majority is that release on parole does not eliminate the life sentence. Revocation of parole for non-criminal violations of technical conditions of parole--a frequent occurrence--results not only in ineligibility for discharge from parole, but also results in re-incarceration for life.

E. SERIOUSNESS OF OFFENSE BASED ON MISAPPREHENDED FACT & LEGAL THEORY.

The Carmona majority's view of the seriousness of the drug offense rested on (1) the possibility of collateral crime, which the U.S. Supreme Court has said is an improper consideration; and (2) the prior failure of all rehabilitation efforts tried by New York, which is simply a misstatement of fact based on misleading references to statistical data in secondary source material, and which is disproved absolutely by all primary source material. The primary source material was apparently not before the Carmona panel, and was overlooked by it.

The majority specifically rejected the view that a penalty cannot be justified solely by a crime's potential for generating more serious, collateral crimes. (slip op. 2660-61)

The majority distinguished the U.S. Supreme Court's Coker decision to the contrary, Coker v Georgia, 53 LEd2d 982, 993 (1977), by citing a Fourth Circuit case which refused to apply its similar ruling in a death penalty case to a "non-capital punishment" case because the death penalty occupies a "special place" in 8th Amendment jurisprudence. (slip op. 2661, n.9) However, the majority overlooked the fact that the Fourth Circuit (as well as the Fifth) has itself also stated that:

"Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others."
Hart v Coiner, 483 F2d 136, 141 (CA4, 1973), cert. den. 415 US 938 (1974).

"In most jurisdictions, sentence to imprisonment for life now stands in the place where the death penalty stood earlier in this century--the ultimate punishment.... life sentence...deserves a consideration which may be unnecessary for a lesser sentence."
Rummel v Estelle, slip op. 2580, 2583 (Docket No. 76-2946 (CA5, 3-6-78)

The majority sought support for considering collateral crime in the precursor conduct (possession, attempts, etc.) and multiple offender statutes, noting that society has a right to prohibit and punish not only overtly criminal conduct but other conduct which creates a probability of danger to society. (slip op. 2661, text & n.9).

However, both precursor and recidivist statutes hold defendants accountable for their own conduct rather than for possible conduct of others and, more importantly, in no such case is the punishment for the precursor conduct more severe than the conduct ultimately feared, had it materialized. These statutes and their theoretical bases thus support the criminalization of drug offenses, but are irrelevant to the severity of the sentence mandated for them.

--PRIOR REHABILITATION "FAILURE" BASED ON MISAPPREHENDED FACTS.

Considerable emphasis was given by the majority to its conclusion that the "vast majority" of addicts treated under New York's expensive treatment program (1967-73) were not cured, but in fact became recidivists. (slip op., 2663-64). The majority supported this conclusion by reference to the 1976 Annual Survey of American Law and to a law article by Hardt and Brooks. Neither citation supports the broad conclusion drawn.

To the contrary, as shown on pages 120-23 of our original brief, in Mosley, the New York methadone maintenance program had been working astoundingly well, with a dramatic lack of recidivism, and this fact was known by the New York legislature through its own commission reports. Indeed, it is ironic that the majority (as did the N.Y. Court of Appeals) notes that the new drug law "was enacted after thorough study and investigation." (slip op. 2667). It is true that the law

was enacted "after" thorough investigation by the N.Y. Temporary State Commission to Evaluate the Drug Laws, but hardly in response to it. The new laws and the reasons assigned to them were in complete disregard of, and run counter to, both the factual findings and the recommendations of the investigative bodies.

The Hardt and Brooks law review article cited by the majority gives an opinion opposite from the majority's. It says that by 1972, the New York drug treatment program had begun a "turnabout in the hitherto steady growth of heroin addiction" and "to demonstrate a clear correlation between treatment and drop in arrest rate." Chester R. Hardt & Ruth Brooks, "Social Policy on Dangerous Drugs: A Study of Changing Attitudes in New York and Overseas", 48 St. John's L Rev 48, 93 (1973).

The 1976 Annual Survey of American Law does say that the New York program had proved to be a colossal failure, with the vast majority of those who underwent treatment soon becoming recidivists. Steven C. Charen & John P. Colangelo, "Criminal Law", 1976 Annual Survey of American Law 313, 353, n.268 (1977). However, the sole authority cited for this footnote to the article was page 77 of the Consumer Union's book, Licit and Illicit Drugs and page 18 of a bar journal article by Suffolk County Court Judge Signorelli. Ibid.

The Signorelli bar journal article cites no evidence, but states only that the Governor has admitted that the program has been a failure.^{3b}

The reference on page 77 of Licit and Illicit Drugs to an 80% failure rate did not refer to the methadone maintenance program, but rather referred to psychological and sociological programs within the New York system.⁴

The 46 Fole-Nyswander methadone maintenance clinics in New York were found to be highly successful by the Consumer Union's Licit and Illicit Drugs. (1972).

Only 3% drop out of this program voluntarily. Another 16% are discharged involuntarily, among other reasons, for excessive use of any other drug, including alcohol, but none has been discharged for abuse of heroin.⁵

15% of the addicts had jobs upon admission to this program. Within 3 months, more than half were productively employed or attending school. After a year, and continuing over the 3 1/4-year period studied, this proportion rose to nearly two-thirds.⁶

More importantly, the overwhelming majority of patients in this program, after years as criminals, were found to lead a law-abiding life on methadone maintenance. Prior to treatment, 91% had been in jail. A 1968 report showed that 88% had remained arrest-free since

⁴ Edward M. Brocher & the editors of Consumer Reports, Licit and Illicit Drugs: The Consumer Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens, and Marijuana--including Caffeine, Nicotine, and Alcohol (Little, Brown & Co., Boston, 1972), pp. 77, 83.

⁵ Licit and Illicit Drugs, supra, pp. 141-42.

⁶ Id., pp. 144-46. The 1969-70 employment record of these ex-addicts was considered to be particularly impressive because it occurred during a period of high and rising nationwide unemployment. Id., p. 148.

^{3b} Ernest L. Signorelli, "A Judicial Analysis and Critique of the New Drug and Sentencing Laws", 46 NYSRJ 9, 18 (1974).

entering the program, and only 5.6% were convicted. An independent evaluation unit in the Columbia University School of Public Health confirmed in 1969 and 1970 that arrest rates (including those not followed by convictions) had fallen from 6 per 100 man-years⁷ the first year on methadone to 3/100 the second year to 2/100 the third year and 1/100 the fourth year. Licit and Illicit Drugs points out that the 2 arrests per 100 man-years achieved by the third year of methadone maintenance is lower than the rate (2.5/100) for the United States population as a whole, including babies and the aged.⁸

These statistics are particularly impressive in view of the fact that 80% of the addicts admitted to the program stay on it without interruption for two or more years.⁹ Success in these terms varies within narrow limits, from 70% to 90% for all kinds of groups, defined by sex, color, age, education, marital status, age of addiction, type of drug abuse, and length of drug abuse. For example, the success rate is:¹⁰

- 90% of those on heroin 5 years or less
- 77% of those on heroin more than 5 years
- 85% of those with 2 criminal convictions or fewer
- 72% of those with 3 or more criminal convictions
- 75% of those with history of alcohol abuse

⁷ Id., pp. 142-43.

⁸ Id., p. 143.

⁹ Id., p. 141.

¹⁰ Id., pp. 150-51.

A 1974 report in Federal Probation, noting a "major reduction" in arrests¹¹ and crimes¹² during methadone treatment, particularized the types of crimes reduced:¹³

"The impact of methadone treatment was to reduce sharply the frequency of charges of violations of the dangerous drug laws. Similarly, the charges of money crimes fell steeply, almost to the preaddiction level. Prostitution arrests fell sharply and did not appear at all in any of the records after methadone treatment had commenced. Misconduct and violence offenses were less often recorded during methadone treatment than during addiction. However, there was a slight increase in both gambling and minor offense categories."

An analysis of all the reports on methadone maintenance issued until 1973, while noting some statistical problems, said that "virtually all investigation lauded the effectiveness of methadone on the reduction of crime."¹⁴

The N.Y. Temporary State Commission to Evaluate the Drug Laws had reached the same conclusion in its reports to the legislature, as shown in our original brief.¹⁵

¹¹ Paul Cushman, Jr., "Relationship Between Narcotic Addiction and Crime", 38 Federal Probation 38, 39-40 (1974).

¹² Id., at 42.

¹³ Id., at 40; see also the statistical chart, at 41.

¹⁴ Stephanie W. Greenberg & Freda Adler, "Crime and Addiction: An Empirical Analysis of the Literature, 1920-1973", 3 Contemporary Drug Problems 221, 249 (1974).

¹⁵ Brief of Petitioners/Appellants, pp. 121-23.

F. MORE SERIOUS CRIME IN NEW YORK WITH MORE LENIENT PENALTIES NOT MENTIONED.

The panel acknowledged that the only crimes in New York which carry a mandatory life term are 1st and 2nd degree murder, 1st degree arson, and 1st degree kidnapping. (slip op. 2667).

The panel failed to mention that not even a persistent (third) felony offender is subject to a mandatory life sentence, and failed to take note of many crimes more serious than drugs which carry more lenient penalties, including attempted murder, rape and sodomy 1st, robbery 1st, burglary 1st, and possession of explosives with intent to use unlawfully against the person or property of another.

The anomaly is that the addict or pusher must be given a life sentence because of crimes he might commit than he could receive if he actually committed several of those feared crimes.

G. PENALTIES IN OTHER JURISDICTIONS DISREGARDED BECAUSE OF ERRONEOUS FACTS.

The panel conceded that the 1973 New York drug law is the harshest in the nation, but dismissed that fact as irrelevant in view of the "fact" of which it took judicial notice, that New York City houses more than half of all the addicts in the entire United States, the panel concluding that the action of states faced with drug problems of lesser magnitude are of little relevance. (slip op. 2667-68).

This factual assumption is not supportable by available statistics. The National Institute on Drug Abuse of the U.S. Dept. of HEW recently released a Technical Paper on the prevalence of heroin use in the nation and in 24 major cities. [N.I.D.A. Technical Paper], Philip H. Person, Jr., Robert L. Retka, & J. Arthur Woodward, "A Method for Estimating Heroin Use Prevalence", U.S. Dept. HEW, National Institute on Drug Abuse Technical Paper (Rockville, Md., DHEW Pub. No. (ADM) 77-439)(1977).

The N.I.D.A. Technical Paper shows, Id., p. 8, that 7 other cities in 5 other states had a higher heroin addict population per capita than New York City in 1975, and that, except for Chicago, the same was true in 1973 when the new drug law was passed. The panel did not have this information before it.

Further, there is a wide disparity in the estimated number of heroin addicts between San Francisco, with 916 addicts per 100,000 people, and New York City, with 608 addicts per 100,000 people. The 8 cities with the highest per capita heroin addict population, in ranking order, are:

1. San Francisco, Calif.
2. Los Angeles, Calif.
3. Phoenix, Ariz.
4. Detroit, Mich.
5. San Diego, Calif.
6. Chicago, Ill.
7. San Antonio, Tex.
8. New York City

Although New York City does have a larger absolute number of addicts (69,600) than any other city (Los Angeles having 60,000), New York State appears to have fewer addicts than California, with the two largest cities in New York having 71,800 addicts and the three largest cities in California having 100,200 addicts. Id., p. 9.

It should also be noted that New York City is not indicative of the rest of the state. Buffalo, the state's second largest city, ranks 24th out of the 24 major cities reported for addicts per capita, and 23rd for the absolute number of addicts (2,200). Only Raleigh, N.C. has fewer addicts. Id., pp. 8-9.

Moreover, instead of housing more than half the addicts in the entire United States, as stated by the Carmona majority, New York City houses between 12% and 13% per cent of the nation's estimated 522,000 to 559,000 addicts. Id., p. 9. The 1973 figures show N.Y.C. with 13% to 14% % of the national total. Id., p. 9.

New York has a serious drug problem. But its problem is smaller per capita than that of 7 other cities and 5 other states, and hardly of such proportions as to warrant disregarding the drug penalties in all other states--one of the main criteria in determining cruel and unusual punishment issues--on the ground that "action of the states faced with drug problems of lesser magnitude are of little relevance."

H. 8th AMENDMENT APPLICABLE TO LENGTH OF SENTENCE.

The Carmona majority, although noting the disproportionality principle, mentioned that it had no direct authority since the U.S. Supreme Court has never found a sentence imposed in a criminal case violative of the 8th Amendment merely because of its length. (slip op. 2654).

Other jurisdictions have held sentences violative of the 8th Amendment solely because of length, as mentioned by Judge Oakes' dissent in Carmona (slip op. 2680-82).

Overlooked by both the majority and the dissent is the fact that in Weems, the U.S. Supreme Court invalidated not only the hard and painful labor portion of the penalty, but separately condemned the lifetime parole feature of cadena temporal. The court found the punishment to be cruel not only in its excess of imprisonment and that which accompanies it, but also in "that which...follows imprisonment" /lifetime parole/. Weems v United States, 217 US 349, 377, 54 LEd 793, 802 (1910), because through that feature, the defendant would be "subject to tormenting regulations that, if no so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty." Id., 217 US at 366, 54 LEd at 798.

I. NO MEASURABLE CONTRIBUTION TEST OVERLOOKED.

The U.S. Supreme Court, in Coker v Georgia, ___ US ___, 53 LEd2d 982, 989 & n.4, 97 Sct 2861 (1977), and Gregg v Georgia, 428 US 153, 173, 49 LEd2d 859, 875, 96 Sct 2809 (1976), reh. den., 429 US 875, established an alternative ground on which a punishment would be considered to be cruel and unusual. Even if the punishment is not grossly out of proportion to the severity of the crime, it will nevertheless be voided if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."

The Carmona majority failed even to mention this alternative test of no measurable contribution, stating instead that it is not the court's function to determine the wisdom of the legislative determination. (slip op. 2669), and noting that evidence on the effectiveness of the drug law is inconclusive (slip op. 2669, n.18).

Our brief in Mosley devoted an entire point (pp. 119-35) to this issue, pointing to irrefutable evidence of the detraction of the new law from the high effectiveness of methadone and heroin maintenance programs and to solid statistical data published by the Association of the Bar of New York City and the Drug Abuse Council, Inc. in 1977 showing that the new drug law had had no effect on drug abuse, did not stem the tide of serious property crime, had no effect on the risk of incarceration, and in fact had led to few convictions. (Mosley brief, pp. 132 ff.) This information was not before the Carmona panel.

The Annual Survey of American Law article relied on by the Carmona majority (slip op. 2669-70, n. 18), contains provable inaccuracies and misleading text.

Dated: June 1, 1978.

Respectfully submitted,

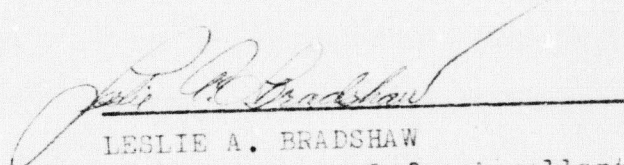
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CERTIFICATE OF SERVICE

This is to certify that on June 1, 1978, I served the appellants' petition for rehearing and suggestion for rehearing en banc by mailing two copies of it to each of the following counsel by U.S. mail, postage prepaid:

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